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No. 10-

In The
SUPREME COURT OF THE UNITED STATES

Dexter Lancelot Rodney,
(Agency No. 045-307-175)
Petitioner,

vs.

Eric Holder, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the 3rd Circuit has asserted that the Executive Office For Immigration Review may determine whether a loss equal to or exceeding $10,000 can be made in removal proceedings based upon the content of a pre-sentence investigation report and a restitution order, even where the record contains no evidence of a stipulation or plea agreement that concede the amount of loss, and may do so even where the District Court made no factual determination of any loss in the criminal proceedings and the District Court made no factual finding as to any actual, intended or attempted loss sustained as a consequence of the alien's criminal conduct in the monetary penalties section of the judgment.

Since the publication of this Court's decision in *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009), various Circuit Courts have had the opportunity to address the sufficiency of agency evidence offered to support a fraud related aggravated felony charge of removal. The Second and Ninth Circuits have not relied upon Pre-Sentence Investigation Reports (hereinafter PSI) or restitution orders when sustaining fraud related aggravated felony determinations of EOIR. Other Circuits, namely the Third and Tenth, have determined that such documents are sufficient to permit the agency to meet its burden of proof on the aggravated felony issue. The Third and Tenth Circuits appear to have relied on the finding of the *Nijhawan* court that immigration courts can rely on sentencing related material to determine the extent of loss in the case of an alien charged with a fraud related aggravated

felony to mean ***any*** document.

Petitioner asserts that the Third and Tenth Circuits err in relying on documents that do not meet the clear and convincing evidence standard referenced in *Nijhawan* when making loss determinations as their approach renders the removal proceedings fundamentally unfair. Petitioner further asserts that the unfairness of the approach adopted by the Third and 10th Circuits is not ameliorated by the fact that aliens have the opportunity to challenge the content of the PSIs and restitution orders. Use of those documents as stand alone evidence of loss is inherently improper due to the low standard of proof attached to them in the absence of a stipulation as to loss a stipulation as to loss.

Importantly, while it is true that the *Nijhawan* court did rely, in part, on a restitution order when sustaining the aggravated felony determination, that order met the "clear and convincing evidence standard" because it was bolstered by a stipulation by the alien regarding the extent of loss. Nothing in *Nijhawan,* however, stands for the proposition that ***any*** restitution order, alone, is sufficient evidence of loss simply because it is a document used in the sentencing stage of the criminal proceedings. Additionally, the *Nijhawan* court made no determination that a PSI, sufficient for consideration by a court upon a mere preponderance standard, was sufficient to meet the clear and convincing evidence test or that use of such documents would be fundamentally fair in removal proceedings where the government asserts that an alien's fraud conviction constitutes an aggravated

felony.

That the consideration of the burden of proof applicable to the evidence used to support an aggravated felony conviction is relevant, is clear by this Court's reliance on precedent of the Board of Immigration Appeals. See, *In re Babaisakov*, 24 I & N Dec. 306 (2007). The *Nijhawan* court concurred with the Board's assertion in *Babaisakov* that sentencing documents presented as proof of an aggravated felony must be evaluated "...with an eye to what losses are covered and to the burden of proof employed." [See, *Babaisakov* at 319] While the Third and Tenth Circuits have focused on the content of PSIs and restitution orders to see what losses are covered, their approach ignores the burden of proof employed in the compilation and presentation of those documents for use in the criminal proceedings.

The three questions presented are:

1. Does the decision of this Court in *Nijhawan v. Holder* , 129 S.Ct. 2294 (2009) stand for the proposition that any sentencing document, including pre-sentence investigation reports and restitution orders unsupported by a plea agreement or stipulation as to the amount of loss, and irrespective of the burden of proof employed to compile it, is sufficient to support a fraud related aggravated felony finding in removal proceedings, when the Immigration and Nationality Act 8 U.S.C. 1229a(c)(3)(A) requires the government to establish removability by clear and convincing evidence?

2. Whether the use of pre-sentence investigation

reports and restitution orders as evidence in fraud related losses contravenes the mandate in *Nijhawan v. Holder*, (supra) that the processes adopted by the government to adjudicate fraud related aggravated felony issues in removal proceedings be fundamentally fair, where the record of conviction contained no evidence that the District Court made a finding as to loss, there is no plea agreement or stipulation as to the amount of loss, and the judgement issued by the court contains no finding of actual, attempted or intended loss, even after the government's presentation of its sentencing evidence?

3. Whether use of PSIs and restitution orders to establish a fraud related aggravated felony in removal proceedings is sufficient evidence that the losses referenced in those documents related solely to the alien's fraud conviction, in view of *Nijhawan v. Holder* (supra), where the alien was convicted of crimes relating to both theft and fraud, the District Court made no finding as to attempted, actual or intended loss for either the theft or fraud counts, the superceding indictment named the same financial entity as being the target of the alien's conduct in both the theft and fraud counts, and where the restitution order relied upon to establish the alien's removability does not assert that it relates to the fraud count, the theft count or both?

CORPORATE DISCLOSURE STATEMENT

Dexter Lancelot Rodney is an individual and has no corporate involvement relevant to these proceedings.

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OPINIONS BELOW

The order of the Court of Appeals below on Petitioner's petition for rehearing, dated October 4, 2010 is unreported, as was the original order, dated September 14, 2010. Both Circuit Court decisions are reprinted at Appendices A and B, respectively. There are three decisions of the Board of Immigration Appeals, dated March 12, 2009, July 28, 2008, and March 6, 2008 respectively, these are reprinted at Appendices C, E and G, respectively. There are two relevant decisions of the Immigration Court, dated October 28, 2008, April 11, 2008 respectively, and these are reprinted at Appendices D and F respectively.

JURISDICTION

The decision of the Circuit Court on Petitioner's Petition for Rehearing was entered on October 4, 2010. The jurisdiction of this court is invoked pursuant to 28 USC sections 1254(1).

STATUTORY PROVISIONS INVOLVED

8 USC section 1227(a)(2)(A) (iii)Aggravated Felony-

Any alien who is convicted of an aggravated felony at any time after admission is deportable;

8 U.S.C. section 1101(a)(43)

The term "aggravated felony" means-

(M)- an offense that-

(i) involves fraud or deceit in which the loss to the victim or victims exceeds

$10,000.

8 U.S.C. section 1229a (c)
(3) Burden on Service In Cases Of Deportable Aliens-
(A) In general- In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial and probative evidence.

PARTIES TO THE PROCEEDINGS

Petitioner is Dexter Lancelot Rodney, a native and citizen of Guyana, who was placed into removal proceedings concluded on or about October 28, 2008. In the removal proceedings, the immigration judge determined that Dexter had committed an aggravated felony due to a conviction for bank fraud pursuant to 18 U.S.C. section 1344. Petitioner appealed the decision of the immigration judge and that decision was upheld by the Board of Immigration Appeals, in an administrative appeal before the Board of Immigration Appeals decided on or about March 12, 2009.

The US Court of Appeals for the Third Circuit, sustained the adverse determination of the Board of Immigration Appeal and denied both the Petitioner's petition for review and petition for rehearing.

The Respondent is Eric Holder, the Attorney General of the United States.

STATEMENT OF THE CASE

1. Federal Appellate Background-

The US Court of Appeals for the Third Circuit denied the Petitioner's petition for rehearing as well as his underlying petition for review upon its determination that the Respondent's consideration of sentencing documents from the criminal proceedings before the District Court, including a pre-sentence investigation report, and a restitution order, were sufficient to establish that the Petitioner's fraud conviction constituted an aggravated felony. The Court of Appeals determined that since consideration of said documents wwas necessary to determine the specific circumstances involved in the crime, they were proper evidence of loss. Thus, the Court of Appeals determined that the Petitioner failed to establish that the Board erred, as a matter of law, in entering an order of removal against him and in failing to terminate the removal proceedings. The Court of Appeals made this determination despite the fact that the criminal court made no finding regarding any fraud related loss at any stage of the criminal proceedings.

Petitioner's original petition for review asserted that the Board of Immigration Appeals erred as a matter of law by relying upon the PSI and restitution order as those documents were not prepared under a clear and convincing evidence standard of proof. Even if the restitution order was properly considered by the immigration judge, the District Court made no assertion that the full amount of the restitution ordered was attributable to the Petitioner's fraud

offense as opposed to his theft offense. The financial institution deemed to be owed restitution was listed as a target of both the Petitioner's theft and fraud conduct in the superceding indictment and, unlike the alien in *Nijhawan v. Holder* (supra) decided by this court, there was no stipulation from Petitioner as to the amount of any loss relating to his fraud conviction.

The Court of Appeals determined that none of the Petitioner's contentions on appeal had merit. Accordingly, the Court of Appeals denied Petitioner's petition for review.

Petitioner sought rehearing of the adverse determination of the Court of Appeals both en banc and on original panel. On or about October 4, 2010, the Petitioner's request for rehearing was denied.

2. Background In Administrative Proceedings -

The Petitioner is Dexter Rodney, a native and citizen of Guyana who entered the United States as a lawful permanent resident on or about February 27, 1996, through New York, NY when he was 18 years of age. Prior to being placed into removal proceedings, the Petitioner resided in East Flatbush, Brooklyn, New York where he resided with his mother, also a lawful permanent resident of the United States. Petitioner has resumed his residence in New York state as he was released from agency custody during the pendency of his petition for review.

The agency filed a notice to appear, dated July 12, 2007, against the Petitioner asserting that the

Petitioner committed an aggravated felony, pursuant to INA 237(a)(2)(A)(iii) as that term is defined at INA section 101(a)(43)(M)(i). In support of its charges of removal, the agency alleged that the Petitioner was convicted of Bank Fraud, before the US District Court for the Southern District of New York, on or about May 14, 2004. In support of the removal charge, the government submitted a copy of the criminal judgment and pre-sentence investigation report filed in the criminal proceedings. The judgment states that the Petitioner was convicted of Bank Fraud, pursuant to 18 U.S.C. section 1344 & 18 USC section 2, and theft of government property, pursuant to 18 U. S.C. section 641. The Petitioner received a sentence of 5 months incarceration for each conviction to be served concurrently.

The notice to appear does not reference the theft of government property offense as being grounds for the Petitioner's removal. No other ground of removal was asserted against the Petitioner.

Review of the documents that were submitted as evidence in the administrative proceedings shows that the only evidence of the amount of the loss to any victim is contained in the pre-sentence investigation report (hereinafter, PSI). In that document, the probation department asserts that the Petitioner was charged under a superceding indictment that asserted that for both Counts One and Two, Petitioner deposited numerous checks into his bank account at Fleet Bank and that none of the checks was duly issued to Petitioner. Further, the PSI asserted that

there was a loss to one financial entity, Fleet Bank. The PSI also indicated that Fleet Bank was listed as a target of the Petitioner's criminal conduct under counts 1 and 2, thus for the theft and the fraud. The PSI asserted that the Petitioner's conduct caused a loss, in the aggregate, to Fleet Bank of $23,450.21.

The PSI, at paragraph 15 (Victim Impact section), provides no indication that Fleet Bank, ever asserted any loss related solely to the fraud count that equaled or exceeded $10,000. Similarly, the Probation department does not assert in the PSI that loss to Fleet Bank related only to the fraud. Rather, the PSI indicates that Fleet Bank was the victim of the "offense" which clearly included the scheme to commit fraud AND theft of the checks in question. Further, though the judgment issued by the District Court imposed restitution, the judgment made no assertion that the District Court relied upon the content of the PSI in calculating the amount of restitution or that the restitution was set based solely due to the fraud offense.

Additionally, though the judgment orders the payment of restitution, the District Court specifically declined to make any findings regarding "loss" to the victim as the result of the Petitioner's alleged criminal conduct in the monetary penalty section of the judgment.

The Petitioner's removal proceedings were placed before the immigration judge on three separate occasions. Initially, the immigration judge deemed the

agency's evidence sufficient to establish removability. The Petitioner appealed that decision asserting ineffective assistance of former counsel in conceding the aggravated felony charge. The Board sustained that appeal and remanded the proceedings to the immigration judge. On first remand, the immigration judge sustained the Petitioner's motion to terminate, finding that the evidence submitted by the agency in support of its removal efforts was insufficient to establish that the Petitioner had been convicted of an aggravated felony.

Subsequent to that decision, the agency appealed to the Board of Immigration Appeals. The Board sustained the agency appeal and remanded the proceedings to the immigration judge for a second time upon its determination that the evidence submitted by the agency was sufficient to establish a fraud related loss of $10,000 or more. Upon the second remand, the immigration judge entered an order of removal finding that the Petitioner had committed an aggravated felony. Upon receipt of that decision, the Petitioner again appealed to the Board which ultimately dismissed the Petitioner's second appeal, relying heavily upon its rationale offered when it sustained the agency appeal. Upon receipt of that decision, the Petitioner filed a petition for review with the US Court of Appeals for the Third Circuit.

The Court of Appeals denied Petitioner's petition for review on or about September 14, 2010 finding that, pursuant to the decision of this court in *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009), the

Respondent could rely upon the content of the PSR which the court asserted was sufficient evidence to establish that Petitioner's fraud conduct caused losses in excess of $10,000 to Fleet Bank. Further, the court determined that a PSR and a restitution order alone were permissible evidence upon which the Board could rely in making a determination regarding the agency's aggravated felony charge.

Additionally, the Court of Appeals determined that the fact that Petitioner neither pled guilty, nor stipulated to loss in the criminal court proceedings was wholly irrelevant to the appeal. The Circuit Court made that determination despite the fact that this court, in *Nijhawan* found the stipulation entered into by the alien there to be a fact of significant importance in its ultimate resolution of the appeal. Lastly, the Court of Appeals determined that Petitioner's assertion that there was no clear assertion by the District Court that "losses" resulting from his criminal conduct were solely as the result of his fraud conduct as opposed both the theft and fraud conduct was without merit. For the aforementioned reasons, Petitioner's petition for review was denied.

Similarly, Petitioner's his request for rehearing was denied on or about October 4, 2010.

REASONS FOR GRANTING THE PETITION

The instant appeal is of particular importance as there appears to be significant conflict among the Courts of Appeals regarding the decision of this Court in *Nijhawan v. Holder* (supra) with respect

to the use of sentencing documents to bolster the agency's fraud related aggravated felony charges in removal proceedings. The consequence of the conflict is that aliens are being deemed to have committed fraud related aggravated felonies based upon the presentation of ANY sentencing documents in the attempt of the Courts of Appeals to determine the circumstance specific nature of fraud offenses as *Nijhawan* directed them to assess the circumstance specific facts.

The questionable documents being relied upon by the agency include pre-sentence investigation reports, documents that fall far short of the clear and convincing evidence standard required by this court in *Nijhawan* as well as restitution orders in cases where there is no stipulation as to the amount of loss involved in the fraud or, in fact any determination by the District Court of any loss based on the alien's fraudulent conduct.

In view of the relatively recent issuance of the *Nijhawan* decision, this Court has not yet had the opportunity to address/clarify the issue as to whether a pre-sentence investigation report is sufficient to meet the *Nijhawan* requirements, or whether use of such documents as evidence in removal proceedings is fundamentally fair as proof of an aggravated felony charge. Similarly, this Court has not yet had the opportunity to address/clairify whether use of a restitution order, not supported by an underlying finding of loss in the criminal proceedings, or a stipulation of loss on the part of the alien, in removal proceedings to prove a fraud related aggravated felony

is fundamentally fair. Clarification from this court on these issues is necessary to enable the Circuit Courts and the Executive Office For Immigration Review to rely on the *Nijhawan* precedent in a uniform and proper manner.

Review Is Warranted To Resolve Substantial Conflict Among The Circuits Regarding The Propriety Of Relying Upon Sentencing Documents Prepared Under A Standard Of Proof Less Than Clear And Convincing Evidence To Establish Aggravated Felony Level Losses In Removal Proceedings In View Of *Nijhawan v. Holder*

Petitioner asserts that the U.S. Court of Appeals for the Third Circuit, and, in fact, other Courts of Appeals, have erred in their respective interpretations of this Court's requirement in Nijhawan (supra) that the agency may rely on some sentencing documents to establish that an alien is removable on account of a fraud related aggravated felony. Although, in *Nijhawan*, this Court underscored the importance of having the documents relied upon by the agency and the Courts of Appeals meet the clear and convincing evidence standard and that the proceedings in which the documents are being considered be fundamentally fair, several Courts of Appeals are showing a clear trend of permitting the use of evidence prepared in a manner below the clear and convincing evidence standard. Those documents, such as PSIs and restitution orders, alone, are deemed acceptable if they are supported by a mere preponderance of the evidence or simply have the indicia of reliability. Further entities preparing

these documents are not prohibited from including hearsay evidence in their content. See *Gregg v. United States,* 394 US 489 (1969) Similarly, defendants have no right to receive Miranda warnings prior to being interviewed by the Probation Department for completion of PSIs. [See *Minnesota v. Murphy,* 465 US 420 (1984)]. Moreover, federal courts can rely upon a PSI when making factual findings for the purposes of sentencing without additional inquiry so long as the document is believed to have a sufficient indicia of reliability." *US. v. Ford*, 558 F.3d 371, 377 (5th Cir. 2009) [Citing, *United States v. Valles*, 484 F.3d 745, 759 (5th Cir.2007)]

Clearly, the type of evidence referenced above would not be allowed to be presented to the judge or jury in proceedings before the District Court prior to sentencing and would not meet the clear and convincing evidence standard imposed upon the agency by the Immigration and Nationality Act if alien in question was lawfully admitted to the United States. 8 U.S.C. section 1229a(c) (3)(A) [See also, *Woodby v. INS*, 385 US 276 (1966)]

Accordingly, in *Nijhawan*, this Court required the agency to establish the $10,000 loss threshold required by 8 USC section 1101(a)(43)(M)(i) by clear and convincing evidence. Thus, there is no genuine conflict as to the appropriate burden of proof imposed upon the agency. There is, however, conflict as to what sentencing documents are sufficient to meet that burden of proof and whether the mere presentation of a restitution order or PSI automatically and independently resolves all question of the extent of

loss attributable to an alien's fraudulent conduct.

Though the *Nijhawan* court stated that any sentencing documents relied upon by the agency in an attempt to obtain a removal order against an alien, based on the allegation that the alien is an aggravated felon due to a fraud related conviction, must meet the *Woodby* test it also held that the underlying removal proceedings must be fundamentally fair.

Several of the Courts of Appeals have come to apply the *Nijhawan* requirements as permitting ***ANY*** sentencing documents as proof of fraud related loss, irrespective of the standard of proof required in the preparation of the document for the criminal proceedings, and without conducting a transparent inquiry as to whether consideration of said sentencing documents in the removal proceedings would be fundamentally fair.

Prior to its entry of a decision in the Petitioner's appeal, the Third Circuit announced a decision in *Kaplun v. Attorney General*, 602 F.3d 260, (3rd Cir. 2010) Though the Third Circuit does not cite *Kaplun* in the opinion issued in Petitioner's appeal, review of the *Kaplun* case is nonetheless instructive. The alien in *Kaplun* pled guilty to an information that alleged that his fraudulent conduct led to a loss of almost $900,000. The PSI that was filed by the government in the removal proceedings further asserted that the loss involved in the alien's crime exceeded $10,000.

The Court of Appeals determined that the guilty plea and the PSR were properly relied upon by the

Board of Immigration Appeals in its determination that the alien had been convicted of an aggravated felony. In supporting its determination, the Third Circuit stated: "Like the Supreme Court in *Nijhawan*, '[w]e can find nothing unfair about the immigration judge's having here relied upon earlier sentencing-related material...this evidence is clear and convincing.'" Id at page 14 of The conclusory nature of the statement of the Court of Appeals that the sentencing related material was clear and convincing appears to be grounded upon a presumption that the documents were sufficient proof of an aggravated felony simply because they were sentencing related documents.

Similarly, the Tenth Circuit, in *Hamilton v. Holder*, 584 F.3d 1284 , (10th Cir. 2009) determined that an alien convicted of conspiracy to commit mail fraud was properly deemed to have committed an aggravated felony as it asserted that "The BIA's decision was consistent with the holding in *Nijhawan*, in that it is permitted to consider information in Hamilton's PSR to determine whether the $10,000 loss threshold for an aggravated felony was met." (Id at page 9 of 9) Inasmuch as neither the facts of the *Nijhawan* case nor the court's opinion refer to a PSI having been determinative as to the issue of loss, the 10th Circuit clearly misapprehended the requirements of the *Nijhawan* decision. Stated differently, rather than conduct an inquiry as to whether a PSI met the clear and convincing evidence standard and whether the consideration of the document rendered the removal proceeding fundamentally fair, the 10th Circuit deemed the document as sufficient evidence of an aggravated felony conviction and $10,000 fraud based loss simply

because it was a sentencing document.

It should be noted that in *Hamilton*, the government's evidence included the alien's PSR and an addendum to that document, the criminal information, as well as the plea agreement and judgment for the alien's co-conspirator. Additionally, Hamilton admitted that he had pled guilty to the fraud offense.

In contrast, the 9th Circuit, in *Kawashima v. Holder*, 615 F.3d 1043 (9th Cir. 2010) sustained the government's aggravated felony charge of removal related to a fraud offense, but did so, not upon reliance of a PSI, but upon reliance on a plea agreement in which the alien admitted that the loss resulting from the crime exceeded $10,000, an information, and a further admission regarding loss.

As in the two aforementioned cases from the Third and 10th Circuits, the aliens in *Kawashima*, husband and wife, were charged as aggravated felons based on several different grounds under the Act, including 8 USC 1101(a)(43)(M)(i) in the removal proceedings. While the 9th Circuit remanded the case of the wife Kawashima, it sustained the aggravated felony removal ground upon the husband Kawashima, finding that the Board "...followed fundamentally fair procedures in finding that the offense for which Mr. Kawashima was convicted resulted in a loss to the government of more than $10,000...Given that in *Nijhawan*, the Supreme Court relied on such a stipulation to conclude that a petitioner's prior crime was an aggravated felony...we can not conclude that the BIA's reliance on such a stipulation in this case

was improper " Id at 21 of 28.

The importance of the *Kawashima* decision is that the 9th Circuit was transparent as to its rationale as opposed to conclusory in that the 9th Circuit provided an analysis of what fundamental fairness in the administrative proceedings required as well as its rationale of the loss issue. Rather than just deem any sentencing document to be sufficient evidence of loss under *Nijhawan*, the 9th Circuit relied upon alien's stipulation as to loss because it was the type of document relied upon by the *Nijhawan* court as sufficient to establish loss.

Similarly, the Second Circuit, in *Rajko Ljutica v, Attorney General*, 588 F. 3d 119 (2nd Cir. 2009), sustained the government's charge against the alien under 8 USC section 1101(a)(43)(M)(i) where the government submitted as evidence the indictment to which the alien pled guilty and the plea agreement, both of which, the court determined, established that there was a loss that far exceeded the $10,000 threshold.

Additionally, in *Lanferman v. BIA*, 576 F.3d 84 (2nd Cir. 2009) the 2nd Circuit noted that pre-sentence investigation reports and restitution orders do not meet the definition of "record of conviction" in removal proceedings. In referencing this Court's decision in *Nijhawan*, the 2nd Circuit held that pre-sentence investigation reports would not be relied upon to determine issues related to the divisbility of statutes. Id at footnote 3

Though the instant case does not involve a divisbility issue as did Lanferman, the 2nd Circuit's discussion is nonetheless instructive. The Court noted that although the *Nijhawan* decision permitted immigration courts to consider a wider range of documents, those courts still, nonetheless, could only consider the documents if the alien has a fair opportunity to present a challenge and the evidence being relied upon by the government met the clear and convincing evidence standard.

The 2nd Circuit further articulated its concerns about propriety of using PSRs in both *Dickson v. Ashcroft*, 346 F.3d 44 (2nd Cir. 2003) and *Dulal-Whiteway v. US Dept of Homeland Security*,501 F.3d 116 (2nd Cir. 2007). In *Dickson*, the 2nd Cir. determined that "...the BIA may not rely on the factual narratives in a PSR to determine the crime for which an alien has been convicted." Id at 55 Additionally, the 2nd Circuit noted that even if a PSR were to be deemed to be admissible as a document sufficient to establish the existence of a conviction under 8 USC section 1229a(c)(3)(B), it would still be insufficient to establish the facts underlying the conviction such as the amount of loss to a victim. [See *Dulal-Whiteway* (supra) at fn 9; see also *Ming Lam Sui v. US*, 250 F.3d 105 (2nd Cir. 2001)]

Similarly, the 2nd Circuit noted the dangers of relying upon a restitution order to establish the amount of loss. In *Dulal-Whiteway*, the court stated: "The restitution set by a judge is based on a loss amount established by a preponderance of the evidence and need not be tied to facts admitted by the defendant's

plea. See 18 USC section 1664e". Id at 130.

While it is true that the 2nd Circuit has stated that its decision in *Dulal-Whiteway* was "abrogated" by this Court's decision in *Nijhawan*, (See, *Ljutica v. Holder* at fn 1), the decision was abrogated only to the extent that the Board, when making a fraud related aggravated felony determination, is not limited to considering only evidence and facts "necessarily" found beyond a reasonable doubt. Inasmuch as, however, the Board is limited to considering only evidence and facts that meet the clear and convincing evidence standard, evidence such as PSRs and restitution orders, which require only a preponderance of the evidence standard or have only an indicia of reliability, are not, under any circumstance, sufficient proof of an aggravated felony simply because they are sentencing related documents.

It is important to note that even in *Nijhawan*, this court did not rely upon a PSR at all, and only relied upon a restitution agreement that was grounded upon a plea agreement/stipulation. Nothing in *Nijhawan* states that either a PSR or a restitution agreement are stand alone evidence sufficient to establish whether an alien's criminal conduct cause a loss equal to or in excess of $10,000 as required by 8 USC section 1101(a)(43)(M)(i).

Lastly, it is important to note that in the Petitioner's criminal proceedings, there was no plea agreement/or stipulation in which he admitted a loss of $10,000 or more. Additionally, he was convicted of theft and fraud for criminal conduct arising out of the

same scheme of conduct, but only subject to removal on account of his fraud conduct under 1101(a)(43)(M)(i). Moreover, though the restitution order named Fleet Bank as the payee of the restitution, the superceding indictment, referenced by the PSR, but not filed as evidence in the removal proceedings, listed Fleet Bank as a target of Petitioner's conduct under both counts I and II (fraud ***AND*** theft). Thus, contrary to the assertions of the Third Circuit and the Board, the mere fact that the restitution order referenced Fleet Bank as the payee, was not clear and convincing evidence that all of the funds due to be paid to Fleet as restitution stemmed from the Petitioner's fraud conviction.

Accordingly, certiorari is warranted to resolve the conflict among the Circuit Courts that has arisen in the wake of this Court's decision in *Nijhawan v. Holder*.

CONCLUSION

For all the foregoing reasons, Petitoner respectfully requests that the Supreme Court grant review of this matter.

Sincerely,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2043

DEXTER RODNEY,
Petitioner

v.

ATTORNEY GENERAL OF
THE UNITED STATES
Respondent

Petition For Review Of An Order Of The
United States Department Of Justice
Board Of Immigration Appeals

Immigration Judge: Honorable Walter A. Durling

Present: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR.,VANASKIE, and GARTH* Circuit Judges

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SUR PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Petitioner

having been submitted to all judges who participated in the decisions of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

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* The vote for Senior Circuit Judge Garth is limited to panel rehearing only.

By The Court:

/s/ Marjorie O. Rendell
Circuit Judge

Dated: October 4, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2043

DEXTER RODNEY,
Petitioner

v.

ATTORNEY GENERAL OF
THE UNITED STATES
Respondent

Petition For Review Of An Order Of The
United States Department Of Justice
Board Of Immigration Appeals
(BIA No. A045-307-175)
Immigration Judge: Honorable Walter A. Durling

Submitted Under Third Circuit L.A.R. 34.1(a)
September 13, 2010

Before: RENDELL, FISHER and GARTH,
Circuit Judges
(Filed: September 14, 2010)

OPINION OF THE COURT

RENDELL, Circuit Judge

Petitioner Dexter Rodney petitions for review of a final order of removal. We will deny the petition.

I.

Rodney, a native and citizen of Guyana, entered the United States as a lawful permanent resident in February 1996. On February 11, 2004, a jury in the U.S. District Court for the Southern District Of New York found Rodney guilty of bank fraud, pursuant to 18 U.S.C. section 1344, and theft of government property, pursuant to 18 U.S.C. section 641, for his theft of over $30,000 in U.S. Treasury checks, which he subsequently deposited at Fleet Bank. On May 14, 2004, U.S. District Judge Victor Marrero sentenced Rodney principally to five months' imprisonment and ordered him to pay restitution to Fleet Bank in the amount of $23,450.21.

On July 12, 2007, the Government served Rodney with a Notice To Appear, charging that he was removable pursuant to 8 U.S.C. section 1227(a)(2)(A)(iii) because he had committed an "aggravated felony", as that term is defined by 8 U.S.C. section 1101(a)(43)(M)(I), since he was convicted of bank fraud and "the amount of the funds exceeded $10,000." On November 6, 2007 an Immigration Judge ordered Rodney removed.

Rodney appealed to the Board of Immigration Appeals, arguing that the Government could not prove that a loss of $10,000 or more resulted from his bank

fraud. On March 6, 2008, the BIA found that Rodney's former counsel was ineffective in failing to challenge the aggravated felony charge, and granted Rodney's motion to remand.

On April 1, 2008, Rodney appeared before the IJ and denied the charge of removability. To support its claim that Rodney had caused a loss of more than $10,000, the Government introduced the pre-sentence investigation report ("PSR") from his criminal proceedings, which showed a loss to Fleet Bank of $23,450.21, as well as the criminal judgment, which reflected a restitution order for the same amount. However, the IJ held that this did not constitute sufficient evidence of the amount of loss, because it did not indicate how Judge Marrero had calculated the restitution award. The IJ therefore dismissed the removability charge and terminated the removal proceedings.

The Government appealed to the BIA. Citing our decision in Nijhawan v. Attorney General, 523 F.3d 387 (3rd Cir. 2008), the BIA found that the Government had introduced adequate evidence of the loss caused by Rodney's conduct and sustained the appeal on July 28, 2008. The BIA noted that the PSR showed the Rodney had deposited stolen checks totaling $37,080.21 into his fleet account, and that these checks caused Fleet to suffer a loss of $23,450.21. The BIA also noted that Judge Marrero had ordered Rodney to pay $23,450.21 in restitution. Furthermore, the BIA held that the totality of the evidence, including the criminal complaint, the judgment of conviction, the PSR, and the restitution order established that the

loss was connected to Rodney's bank fraud conviction. The BIA therefore remanded the case to the IJ for proceedings consistent with its opinion.

On September 16, 2008, Rodney appeared before the IJ and argued that the BIA had not addressed his argument that the Government had failed to show that the loss to Fleet Bank resulted from his bank fraud, rather than from his theft of government property. He further argued that he had not been given an opportunity to argue that Nijhawan was inapplicable to his case. In a ruling issued in October 2008, the IJ declined to permit Rodney to make further arguments because the BIA had already considered Nijhawan, and ordered Rodney removed to Guyana. Rodney appealed to the BIA again, raising the same arguments that he had just presented to the IJ. On March 12, 2009, the BIA dismissed Rodney's appeal, citing the reasoning from its previous decision. The BIA also indicated that, even if Rodney had not previously had an adequate opportunity to argue the impact of Nijhawan, "he has now submitted his arguments in this regard to the Board." App.4

Rodney now seeks review of the BIA's decision.

II

Rodney challenges the BIA's determination that he caused a loss of more than $10,000, which was necessary in order to find that he had been convicted of an aggravated felony under 8 U.S.C. Section 1101(a)(43)(M)(i). "Whether [a] conviction

constitutes an aggravated felony presents a question of law within our subject matter jurisdiction over which we exercise plenary review...We do not defer to the BIA's determination of whether a crime constitutes an aggravated felony." Henry v. Bureau of Immigration & Customs Enforcement, 493 F.3d 303, 306 (3rd Cir. 2007) (citations omitted). In applying the $10,000 threshold, we must consider "the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." Nijhawan v. Holder, 129 S.Ct. 2294 (2009). We exercise jurisdiction under 8 U.S.C. section 1252(a)(2)(D) to review "questions of law," including the question of whether a conviction constitutes an aggravated felony. Henry, 93 F.3d at 306[1].

Although Rodney vigorously resists this straightforward conclusion, none of his arguments have merit. First, he points to an inconsistency in the PSR, which describes the number of fraudulently checks he deposited as both 47 and 49. However, Rodney did not challenge this finding before Judge Marrero, and this inconsistency does not undermine the evidence that Rodney caused losses in excess of $10,000. Second, he argues that a restitution order alone is not necessarily sufficient evidence of the amount of loss. Although this may be true, the combination of the PSR and the restitution order in this case, especially in the absence of any contrary evidence pointing to a smaller loss, are sufficient to support the finding that Rodney caused a loss of $23,450.21. Nijhawan, 129 S.Ct. At 2093.

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[1]For this reason, we will deny the Government's motion to dismiss the petition for lack of jurisdiction.

Third, he argues that he did not plead guilty, did not admit the accuracy of the PSR, and did not otherwise admit that he had caused a loss in excess of $10,000. However he cites no authority for the proposition that such admissions are necessary to the finding as to the loss amount.

Fourth, Rodney argues that there is no evidence that the pecuniary loss caused by his crimes resulted from his bank fraud, rather than his theft of government property. This contention is also without merit. The loss to Fleet Bank unquestionably resulted from his bank fraud–i.e. his "scheme...to defraud a financial institution; or...to obtain any of the moneys...[of] a financial institution, by means of false or fraudulent pretenses." 18 U.S.C. section 1344. Although his additional criminal actions in stealing the U.S. Treasury checks, in violation of 18 U.S.C. section 641, may have enabled him to perpetrate this fraud on the bank, the BIA was not required to dissect the causal chain as intricately as Rodney would like. Moreover, the only sensible interpretation of Judge Marrero's restitution order is that Fleet Bank was the victim of Rodney's bank fraud, since restitution is used to compensate the "victim" of a crime, see 18 U.S.C. section 3664, and the bank could not have been a "victim" of Rodney's theft of government property.

Finally, Rodney argues that the BIA denied him due process by relying on our decision in Nijhawan v. Attorney General, 523 F.3d 387 (3rd Cir. 2008), without giving him notice and an explicit invitation to present argument regarding the impact of that case. We can find no authority, and Rodney cites none,

for the proposition that the BIA has a constitutional obligation to inform aliens of every legal authority on which it plans to rely. Moreover, in this case, Rodney had at least two opportunities to present arguments to the BIA regarding the impact of Nijhawan: both in response to the Government's brief prior to the BIA's July 2008 decision, and in his third appearance before the BIA , after the IJ's October 2008 decision.

We have considered Rodney's remaining arguments and find them to be without merit.

III

For the reasons set forth above, we will deny the petition for review.

APPENDIX C A-10

U.S. Department Of Justice

Executive Office For Immigration Review
Decision Of the Board Of Immigration Appeals

Falls Church, Virginia 22041

File: A045-307-175- York, PA Date: March 12, 2009
In re: DEXTER LANCELOT RODNEY a.k.a. Rodney Dexter a.k.a. Dexter Rodney

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sandra Greene, Esquire

ON BEHALF OF DHS: Maureen C. Gaffney
Assistant Chief Counsel

APPLICATION: Termination

The respondent has appealed from an Immigration Judge decision dated October 28, 2008, that , in consideration of our previous decision dated July 28, 2008, found the respondent removable as charged. The appeal will be dismissed.

We review the findings of fact, including determinations of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. section 1003.1(d)(3)(i). We review all other issues,

including whether or not the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. section 1003.1(d)(3)(i).

In a prior decision, the Board held that the respondent's conviction for bank fraud constituted an aggravated felony under section 101(a)(43)(M)(i) of the Immigration and Nationality Act; 8 U.S.C. section 1101(a)(43)(M)(i). The respondent is challenging that determination in the present appeal. The respondent argues that, as he was convicted of both a fraud offense and a theft offense and the Pre-sentence Investigation(PSI)(Exh.G) relied on by the Board related to both offenses, it was error for the Board to find that the restitution amount related to the fraud offense. This is important because section 101(a)(43)(M)(i) of the Act requires a loss to the victim exceeding $10,000.

Despite the respondent's contentions on appeal, there is clear and convincing evidence that the "loss to the victim"- in this case, Fleet Bank- exceeded the $10,000 threshold. As we previously held, the bank fraud was committed against the Fleet Bank, to which the restitution of $23,450.21 was ordered. The theft crime, Theft of Government Property under 18 U.S.C. section 641, was committed against the United States Treasury and the New York City Employees Retirement System. While the respondent argues that our prior decision made no specific mention of what restitution applies to which crime, this is not the case (BIA Dec., supra, at page 2 para.2). We affirm our previous finding that the PSI properly ties

or tethers the fraud offense to a loss amount of over $10,000 See Nijhawan v. U.S. Attorney Gen., 523 F.3d 387 (3rd Cir. 2008); Matter of Babaisakov, 24 I&N Dec. 306 (BIA 2007). To the extent the respondent argues that Nijhawan v. U.S. Att'y Gen., supra, was issued after the Immigration Judge's decision in this case and he should have been provided an opportunity to address this decision before the Immigration Judge, he has now submitted his arguments in this regard to the Board, which has ultimate authority to rule on the question.

The other arguments raised by the respondent on appeal are similarly unavailing. To the extent the respondent argues there is no actual loss listed in the conviction documents, and the restitution amount should not be considered as evidence of "loss" we disagree. As discussed in Matter of Babaisakov, supra., information regarding the amount of restitution may be considered in determining the amount of "loss" for purposes of section 101(a)(43)(M)(i). Id. (Citing Munroe v. Ashcroft, 353 F.3d 225(3rd Cir. 2003)). We previously addressed the argument that there is no evidence that he admitted to the restitution amount or was provided an opportunity to challenge the amount in the PSI. Nonetheless, the PSI is properly considered in determining the amount of the loss, despite the respondent's conviction by a jury. (BIA Dec., supra at pages 203). See Nijhawan v. US Att'y Gen. , supra.; Matter of Babaisakov, supra. The respondent also argues that his situation is similar to that in Nugent v. Ashcroft, 367 F.3d 162 (3rd Cir. 2004), where the respondent was convicted of both a theft and a fraud crime. That is where the similarity

ends, however. Here, as discussed above and in our previous decision, there is a clear tie between the specific fraud conviction and the loss. For this same reason, the linkage between the conviction and the amount of loss, the respondent's reference to Alaka v. Att'y Gen. Of the United States, 456 F.3d 88 (3rd Cir. 2006) also fails to support his arguments.

ORDER: The appeal is dismissed.

/s/ Edward R. Grant
FOR THE BOARD

UNITED STATES DEPARTMENT OF
JUSTICE EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW UNITED STATES
IMMIGRATION COURT
York, Pennsylvania

File No.: A 045 307 175 October 28, 2008

In The Matter Of)
DEXTER LANCELOT RODNEY)
Respondent)

IN REMOVAL PROCEEDINGS

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENT
Sandra Greene, Esquire

ON BEHALF OF DHS:
Maureen Gaffney
Assistant Chief Counsel

ON REMAND FROM THE BOARD OF
IMMIGRATION APPEALS

The respondent is a 29-year old male alien, native and citizen of Guyana.

On July 28, 2008, the Board remanded the record to act consistently with the Board's finding that the respondent has been convicted of an aggravated

felony as defined by INA section 101(a)(43)(M)(i) finding that the loss exceeded $10,000.

The respondent had appeared in court earlier, indicating he had a fear of returning to Guyana, but the Court granted the respondent leave to today to file the form I-589.

The Respondent's counsel has indicated to the Court the respondent has decided not to pursue any relief under the Convention Against Torture or withholding of removal in this matter, will not be filing the Form I-589, and has requested an order from the Court.

Accordingly, based upon the foregoing and based upon or in light of the Board's ruling in this matter, the following order is hereby entered.

ORDERS

Respondent is hereby ordered removed from the United States to Guyana.

_____

Walter A. Durling
Immigration Judge

U.S. Department Of Justice

Executive Office For Immigration Review
Decision Of the Board Of Immigration Appeals

Falls Church, Virginia 22041

File: A045-307-175- York, PA
Date: July 28, 2008
In re: DEXTER LANCELOT RODNEY a.k.a. Rodney Dexter a.k.a. Dexter Rodney

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sandra Greene, Esquire

ON BEHALF OF DHS: Maureen C. Gaffney
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. section 1227(a)(2)(A)(iii)]-

Convicted of an Aggravated felony

APPLICATION: Termination

This case was last before us on March 6, 2008,

when we vacated the Immigration Judge's November 6, 2007, decision and grar .ed the respondent's motion to remand, in which he asserted that his criminal trial attorney rendered ineffective assistance of counsel in conceding his removability before the Immigration Judge on November 6, 2007.

The Department of Homeland Security (DHS) now appeals the Immigration Judge's April 11, 2008, decision on remand granting the respondent's motion to terminate the aggravated felony ground of removal pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. section 1227(a)(2)(A)(iii). The DHS contends that it has met its burden of establishing that the respondent's bank fraud conviction involved a loss to a victim or victims exceeding $10,000.00, and therefore is an aggravated felony as defined in section 101(a)(43)(M) of the Act. The respondent, a native and citizen of Guyana, moves for affirmance of the Immigration Judge's decision[1]. The respondent contends that the Immigration Judge was correct in the April 11, 2008, decision which found that the evidence of record fell short of the "clear and convincing standard: set forth in section 240(c)(3)(A) to establish the amount of loss resulting from his federal fraud conviction pursuant to 8 U.S.C. section 1344, as opposed to the theft conviction pursuant to 8 U.S.C. section 641. The Immigration Judge also

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[1]Although the heading of the respondent's appellate brief, received on June 26, 2008, incorrectly indicates that he filed it in support of his appeal of the adverse decision of the Immigration Judge, we will accept it as a brief in opposition to the DHS's appeal.

found that the record did not reveal how the trial judge arrived at the $23,450.21 restitution total, as reflected in the criminal judgement. The DHS's appeal will be sustained and the record will be remanded for a new decision consistent with our findings below.

We find that the evidence submitted by the DHS supports a finding that the "loss to the victim" and the restitution amount in this case are attributable to the respondent's conviction under Count I (bank Fraud-18 U.S.C. Section 1344). See Nijhawan v. U.S. Att'y Gen., 523 F.3d 387, 399 (34d Cir. 2008)[1] (it is well within the competence of a court to examine the record for clear and convincing evidence of the loss caused by the conduct of conviction); see Matter of Babaisakov, 24 I&N Dec. 306 (BIA 2007). The original January 10, 2003, complaint was filed against the respondent by a Postal Inspector. It charged that the combined total of 42 fraudulent checks deposited in the Fleet Bank account opened by the respondent was approximately $33, 425.36. The criminal docket for the respondent's case in the United States District Court for the Southern District of New York, dated February 11, 2004, reflects that a jury found the Respondent guilty of Counts 1 and 2. The respondent's pre-sentence investigation report (PSI), submitted on his May 14, 2004, sentencing date, confirms that the jury found the respondent guilty of Count 1, Bank Fraud under 18 U.S.C. section 1344, and Count 2,

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[1]We note that the United States Court of Appeals for the Third Circuit issued its decision in Nijhawan v. U.S. Att'y Gen., supra, in May 2008 , subsequent to the Immigration Judge's April 11, 2008, decision.

Theft of Government Property under 18 U.S.C. section 641. The PSI reveals that the defendant fraudulently deposited stolen checks totaling $37,080.21 into his Fleet Bank account (PSI at 5, item 21).

The PSI further shows that as a result of the fraudulent checks that cleared, Fleet Bank, the victim of this offense, suffered losses of $23,45021 (PSI at 4, item 15). The PSI recommends that full restitution to the victim is required under 18 U.S.C. section 3663A and 18 U.S.C. section 3664, and that restitution in the amount of $23,450.21 is owed to Fleet Bank (PSI at 10, item 59). The trial judge ordered that the respondent pay restitution in the amount recommended in the PSI. We find that this document clearly reveals how the trial judge arrived at the $23,450.21 restitution total, and that it alleges a specific monetary loss related to the respondent's fraud conviction.

We conclude that, taken together, the complaint filed against the respondent, the criminal docket documenting the judgement of conviction and the PSI with the restitution order, establish that the requisite loss was tied to the respondent's conviction of bank fraud. See Nijhawan v. U.S. Att'y. Gen., supra. At 395. We also conclude that a conviction under 18 U.S.C. section 1344 is clearly a "fraud" offense. Id. At 390-91. As Fleet Bank was the "victim" of this fraud offense, and the amount of its loss exceeded $10,000.00, we find that the DHS has met its burden of establishing that the respondent was convicted of an aggravated felony as defined in section 101(a)(43)(M).

Finally, even though the respondent was found

guilty by a jury and not by a plea agreement, we disagree with the immigration judge's finding that the PSI did not reflect that the respondent agreed to the alleged loss, or that he was given an opportunity to object to that amount. In Nijhawan, as in the case, the respondent was found guilty of fraud by a jury. In its decision, the Third Circuit held that the language of section 101(a0(43)(M)(i) of the Act does not require a jury to have determined that there was a loss in exess of $10,000.00. Nijhawan v. U.S. Att'y Gen., supra. at 391. The Third Circuit further held that "the amount of loss in a restitution order, which by its nature is neither found by a jury nor specifically pled to by a defendant, could be considered." Id. At 394. Therefore, as applied to this case, the fact that the respondent was found guilty by a jury does not prevent the Immigration Judge's consideration of the alleged loss set forth in the PSI and relied upon by the criminal trial judge.

Accordingly, we find that the Immigration Judge erred in terminating proceedings. The evidence submitted by the DHS establishes that the respondent was convicted of a fraud offense, Fleet Bank was the victim of that loss, and the amount of that loss was in excess of $10,000.00.

ORDER: The appeal of the Department of Homeland Security is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings not inconsistent with the foregoing opinion and for the entry of a new decision.

/s/ Molly Randall Clark

FOR THE BOARD

APPENDIX F A-22

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW UNITED STATES IMMIGRATION COURT
York, Pennsylvania

In The Matter Of)
RODNEY, Dexter L.)
Respondent)

IN REMOVAL PROCEEDINGS
File # A 45-307-175

ON BEHALF OF RESPONDENT
Sandra Greene, Esquire

ON BEHALF OF DHS:
Maureen Gaffney

Motion: Dismissal of Aggravated Felony

On Remand From The Board Of Immigration Appeals

RULING OR AGGRAVATED FELONY

On March 6, 2008, the Board remanded this record based on the ineffectiveness of respondent's prior counsel, who had erroneously conceded the aggravated felony ground of removal as defined in INA section 101(a)(43)(M)(i). Based on such concessions, this court undertook no effort to determine the legal efficacy of the ground of removal and ordered

respondent's removal. The Board remanded in order for this court to examine the conviction record.

The government has submitted its brief contending that the amount of loss is accurately reflected in the Judgement as well as in the PSI, and rests on the record evidence. Respondent, through Counsel, rests on its appellate brief submitted to the Board wherein he contends that the record evidence is insufficient as a matter of law to establish any amount of loss.

After due consideration, this court is constrained to concur with respondent. The evidence in this record falls short of the "clear and convincing standard" as set forth at INA section 240(c)(3)(A) to establish the amount of loss resulting from his federal fraud conviction. INA section 101(a0(43)(M)(i) requires a threshold loss in excess of $10,000. To that extent, the court adopts as its own the arguments and legal reasoning set forth in respondent's appellate brief.

In essence, this record does not reveal how the trial judge calculated the amount of restitution as reflected in the judgment, and to what extent such restitution is premised upon the loss to the victims as a result of respondent's conduct underlying his conviction. Nor does the superseding indictment, as reflected in the PSI, allege any specific monetary loss. For that matter, there is no reflection in this PSI that respondent agreed to the alleged loss reflected therein, or that he was given the opportunity to object to the report. Given that respondent was found guilty at trial by jury, there would be no plea agreement that might have reflected the amount of loss.

The government requests this court to, in effect, give a leap of faith that the loss exceeds $10,000. as reflected in the restitution ordered by the trial judge in the sentencing phase of the trial. The court is not willing to do so. The Board recognized in Matter of Babaisakov, 24 I&N Dec. 306, 321, fn 12 (BIA 2007), that the Third Circuit requires that the record evidence must establish the $10,000. threshold amount be connected to the loss resulting from his conviction. That connection is wholly lacking in this record. Accordingly, based on the foregoing, the following orders will be entered.

ORDER: The aggravated felony ground of removal, per INA section 237(a)(2)(A)(iii), is dismissed.

FURTHER ORDER: These removal proceedings are hereby terminated.

/s/ Walter Durling
Walter A. Durling
Immigration Judge

April 11, 2008

APPENDIX G A-25

U.S. Department Of Justice

Executive Office For Immigration Review
Decision Of the Board Of Immigration Appeals

Falls Church, Virginia 22041

File: A045-307-175- York, PA Date: March 6, 2008
In re: DEXTER LANCELOT RODNEY a.k.a. Rodney Dexter a.k.a. Dexter Rodney

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Sandra Greene, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. section 1227(a)(2)(A)(iii)]-
Convicted of an Aggravated felony

APPLICATION: Termination

The respondent appeals from the Immigration Judge's November 6, 2007, decision finding him removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act. He also moves to remand, asserting that his trial attorney rendered him

ineffective assistance in conceding his removability. (Tr. At 20-21). The Department Of Homeland Security has not filed an appeal brief or a response to the motion to remand. The motion will be granted, and the case will be remanded to the Immigration Judge for further proceedings.

The respondent has complied with the evidentiary requirements for asserting a claim of ineffective assistance of counsel outlined in Matter of Lozada, 19 I&N Dec. 637, 639 (BIA 1988).[1]See Lu v. Ashcroft, 259 F.3d 127, 132 (3rd Cir. 2001)(approving the Lozada requirements). In order to prevail on a claim of ineffective assistance, the Third Circuit has stated that an alien "must demonstrate prejudice, he 'must show that he was prevented from reasonably presenting his case.'"Ponce-Leiva v. Ashcroft, 331 F.3d 369, 377 (3rd Cir. 2002), citing Uspango v. Ashcroft, 289 F.3d 226, 231 (3rd. Cir. 2002).

We conclude that the respondent has established a claim of ineffective assistance of counsel. We find that a competent attorney would have challenged the respondent's removability based on the aggravated felony charge listed in the Notice to Appear. As the respondent outlines in his appeal brief, there are arguable issues as to whether the DHS met its

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[1]Under Matter of Lozada, supra, a motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit, reflect whether a complaint had been filed with the appropriate disciplinary authorities, and include a response to the allegations by former counsel or report counsel's failure or refusal to respond. Matter of Lozada, supra, at 639.

burden of establishing that the respondent's bank fraud conviction involved a loss to a victim or victims exceeding $10,000 to constitute an aggravated felony as defined in section 101(a)(43)(M) of the Act. Because the respondent "was prevented from reasonably presenting his case," we find that he established the requisite prejudice to support a remand for a hearing on removability. See Ponce-Levia v. Ashcroft, supra.

Accordingly, the Immigration Judge's November 6, 2007 decision will be vacated, the motion to remand will be granted, and the case remanded to Immigration Court for further proceedings.

ORDER: The Immigration Judge's November 6, 2007, decision is hereby vacated.

FURTHER ORDER: The respondent's motion to remand is granted, and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

John Guendelsberger

FOR THE BOARD